

## Constitutional Law - Stanley v. Illinois: New Rights for Putative Fathers

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## CASE NOTES

### CONSTITUTIONAL LAW—STANLEY V. ILLINOIS: NEW RIGHTS FOR PUTATIVE FATHERS

In 1969, Peter Stanley's common law wife<sup>1</sup> died leaving him with two dependent children after eighteen years of cohabitation. After a subsequent dependency hearing,<sup>2</sup> these children were made wards of the Circuit Court of Cook County, Illinois. Since Stanley is not a "parent" under Illinois law, but a legal stranger to his children, the trial judge held that he was not entitled to a hearing as to the custody or control of his children, but must bring adoption or guardianship proceedings in order to achieve these ends.<sup>3</sup> Stanley petitioned the Illinois Supreme Court, challenging the legislative scheme of Illinois as a violation of equal protection of the laws as guaranteed by the fourteenth amendment. The Illinois Supreme Court upheld the legislation as constitutional, maintaining that the statutes are rationally related to the purpose of the Juvenile Court Act.<sup>4</sup> The United States Supreme Court, in a 5-2 decision, reversed the Illinois judgment, but restricted its opinion to holding that the denial of a hearing on his fitness as a parent violated Stanley's rights under the due process and the equal protection clauses. *Stanley v. Illinois*, 405 U.S. 645 (1972).

*Stanley v. Illinois* has significance in two principal areas: (1) This is the first Illinois case which has dealt with these statutes which exclude the father of illegitimate children from the enjoyment of any rights to the custody or control of his children since the momentous decisions of *Levy*

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1. ILL. REV. STAT. ch. 89, § 4 (1971) (Illinois does not recognize common law marriages).

2. ILL. REV. STAT. ch. 37, § 702—5 (1967) (those who are dependent include any minor under 18 years of age who is without a parent, guardian or legal custodian).

3. ILL. REV. STAT. ch. 37, § 701—14 (1969). (" 'Parents' means the father and mother of a legitimate child or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent. . . .") ILL. REV. STAT. ch. 106 ¾, § 62 (1969) ("A person charged or alleged to be the father of a child born out of wedlock, whether or not adjudicated the father under this Act, shall have no right to the custody or control of the child except such custody as may be granted pursuant to an adoption proceeding initiated by him for that purpose.").

4. *In re Stanley*, 45 Ill. 2d 132, 256 N.E.2d 814 (1970).

*v. Louisiana*<sup>5</sup> and *Glon v. American Guarantee and Liability Insurance Co.*;<sup>6</sup> it is clearly a meaningful contribution to the developing law concerning the invalidity of a classification based on illegitimacy; (2) *Stanley* has only modest significance for the various attempts which have been made to have the Court call a sex-based classification "suspect." Although a sex-based classification is involved, the Court does not deal directly with that issue. Therefore, *Stanley* may represent another reason, if one is needed, why the equal rights amendment is necessary to overcome the hesitancy on the part of the Court to fully utilize the fourteenth amendment to legally equalize men and women. This note will consider both of these areas.

It is particularly appropriate that this attempt to expand the legal rights of the putative father should occur in Illinois, as this is one of the few states which has stated, as a matter of law, that a father is never entitled to his illegitimate child's custody.<sup>7</sup> Earlier in Illinois history the putative father's rights to custody were linked to his duty to support. If he gave the court a bond for the support of the child, he was entitled to demand custody.<sup>8</sup> If the mother refused to grant custody, the father was discharged from liability on his bond.<sup>9</sup>

In 1861, the father's right to demand custody of his children was reduced to cover children over ten years old (if the mother were living and wished to retain custody), and when the mother was adjudged unfit.<sup>10</sup> The only reported case under this version of the statute where the father asked for custody was *In re Richards*.<sup>11</sup> Although the mother had given up the illegitimate child in this situation, the court refused to give the father custody, because he had originally denied paternity; the third party was "fit"; and it was in the "best interest" of the child. This law remained unchanged until 1949, when the Illinois legislature amended the Bastardy Act,<sup>12</sup> ostensibly to avoid any conflict with the *Adoption*

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5. 391 U.S. 68 (1968) (upholding the right of an illegitimate to recover for the wrongful death of his mother).

6. 391 U.S. 73 (1968) (considering and rejecting the claims that an illegitimate parent's problem of proving relatedness justifies a substantial denial of rights and that the deterrence policy of the states justified discrimination against the parents of illegitimates).

7. See generally Note, 46 ILL. L. REV. 156 (1951).

8. REVISED CODE OF LAWS OF ILL. 244 (1827).

9. Wright v. Bennett, 7 Ill. 587, 590 (1845).

10. PUB. LAWS ILL. 198 (1871-72); ILL. REV. STAT. ch. 17, § 13 (1945).

11. 328 Ill. App. 591, 66 N.E.2d 512 (1946).

12. ILL. REV. STAT. ch. 106 ¾, § 62 (1969).

Act,<sup>13</sup> so as to deny the father any rights of custody or control regardless of the wishes of the mother.

Although the father now has no rights over his child, the support provisions for illegitimate children by their fathers have increased to the point where the father is liable for the "support, maintenance, education and welfare of the child until the child is 18 years old, or until adoption, to the same extent and in the same manner as the father of a child born in lawful wedlock. . . ." <sup>14</sup> Although this extensive liability toward the child may seem out of balance with the absence of rights, there are many other statutory provisions which limit the liability of the father toward his child in daily life.<sup>15</sup> In addition, the court retains jurisdiction over the child if paternity is established, leaving open the possibility of a petition by the father to the court to determine if the child is being neglected, or to make any orders which may be necessary for the "maintenance, education, and welfare of the child."<sup>16</sup> Thus, the situation of the putative father is actually not as extreme as is described in *Wallace v. Wallace*: "The father has the duties to his illegitimate child *equal to the duties of a father of a legitimate child*, but he has none of the rights enjoyed by the father of a child born in wedlock."<sup>17</sup>

In summary, the putative father in Illinois is a parent only to the extent that he must support his child. If the father is living with the mother in a common law relationship, as in *Stanley*, and the mother dies, the child can be removed from the custody of the father without a hearing

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13. ILL. REV. STAT. ch. 4, § 9.1—8 (1969): "A consent shall not be required from the father of an illegitimate child, nor shall the consent of the father of an illegitimate child be required after marriage of the father to the mother of an illegitimate child, where consent to adoption has been given by the mother prior to the marriage, nor shall a consent be required from the father of an illegitimate child notwithstanding that the father of such child has been ordered to support such child in accordance with the provisions of the Paternity Act."

14. ILL. REV. STAT. ch. 106 ¾, § 52 (1969).

15. ILL. REV. STAT. ch. 70, § 53 (1969) (only a parent is personally liable for malicious damage to persons or property by the minor); ILL. REV. STAT. ch. 122, § 2610 (1969) (only a parent is liable for child's truancy); ILL. REV. STAT. ch. 23, § 2359 (1969) (only a parent is liable for abandonment of child); ILL. REV. STAT. ch. 23, § 2369 (1969) (only a parent liable for knowingly permitting a child to associate with thieves, visit a place of prostitution, or violate a curfew ordinance); ILL. REV. STAT. ch. 89, § 3 (1969) (consent of the parent required for marriage); ILL. REV. STAT. ch. 61, § 186 (1969) (consent of the parent required to obtain a hunting license); ILL. REV. STAT. ch. 91, § 82—2 (1969) (consent of the parent required to undergo surgery); ILL. REV. STAT. ch. 38, § 83—4 (1969) (consent of the parent required to possess firearms).

16. ILL. REV. STAT. ch. 37, § 702—4(1) (1969); ILL. REV. STAT. ch. 106 ¾, § 59 (1969).

17. 60 Ill. App. 2d 300, 303, 210 N.E.2d 4, 5 (1965).

as to his fitness. The thrust of the majority opinion in *Stanley* is against this system which allows an unwed mother and both married parents a fitness hearing and withholds this right from the unwed father:

. . . as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that by denying him a hearing and extending it to all other parents whose custody of their children is challenged the State denied Stanley the equal protection of the law guaranteed by the Fourteenth Amendment.<sup>18</sup>

In order to determine if there has been a violation of due process or equal protection, the Court stated there must be a balancing of the interests concerned.<sup>19</sup> The court must decide whether the public or government interest, which is represented by the statute in question, outweighs the detriment to the private interests which will be curtailed by enforcing the statute. If the private interest is deemed fundamental, then there must be a "compelling state interest" to justify restricting it.

The majority accepts petitioner's argument that his interest which is abridged by the statute is fundamental: it is the interest of an unwed father in rearing his children free from governmental interference.<sup>20</sup> Absent a "powerful countervailing interest" this fundamental interest deserves protection.<sup>21</sup> The fact that Stanley's relationship to his children is not legitimized or legalized by a marriage ceremony does not allow the state to discriminate against him.

It is interesting that Justice White should cite *Levy v. Louisiana*<sup>22</sup> and *Glon v. American Guarantee and Liability Insurance Co.*,<sup>23</sup> as there has been some discussion since these cases that Justice Douglas' opinion would not apply to the father-child relationship and at least one court has held accordingly.<sup>24</sup> *Levy* and *Glon* clearly prohibit laws discriminating against an illegitimate in his relationship with his mother because no rational legislative purpose can support such "invidious discrimination." Several other jurisdictions have ruled similarly in applying the equal protection clause to the father-child relationship.<sup>25</sup>

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18. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) [hereinafter *Stanley*].

19. *Id.* at 650.

20. Petitioner's brief at 19.

21. *Stanley* at 651.

22. 391 U.S. 68 (1968).

23. 391 U.S. 73 (1968).

24. *Baston v. Sears*, 15 Ohio St.2d 166, 239 N.E.2d 62 (1968); see also *Labine v. Vincent*, 401 U.S. 532 (1971); *George v. Bertrand*, — La. App. —, 219 So. 2d 177 (1969) (refusing recovery by father of illegitimate for wrongful death of child).

25. *Levy* on remand seems to hold this position: *Levy v. Louisiana*, 253 La. 73, 79, 216 So.2d 818, 820 (1968) ". . . [t]he United States Supreme Court has held

Within weeks of *Levy*, for example, the Missouri Supreme Court extended Douglas' reasoning:

The decisions of the United States Supreme Court compel the conclusion that the proper construction of our statutory provisions relating to the obligations and rights of parents . . . affords illegitimate children a right equal with that of legitimate children to require support by their fathers.<sup>26</sup>

Applying *Glon* in particular, the Colorado Supreme Court held that the support obligations of the father of an illegitimate child could not be upheld. The statute in question allowed a jury to assess the amount of support in a final verdict, without allowing for future financial changes, thus imposing a substantially different support obligation from that imposed on the father of a legitimate child.<sup>27</sup> Another statutory scheme which gave greater protection to the legitimate child in its support provisions was overturned by the New York courts.<sup>28</sup> Finally, the New Jersey Supreme Court reversed the appellate court's rejection of *Levy* as inapplicable to the father-child relationship by holding that it would be a denial of equal protection to deny the right of an illegitimate child to bring an action under the wrongful death statute for tortious injury resulting from the death of his father, where it was granted to a legitimate child.<sup>29</sup> The decision in *Stanley* certainly seems to end any dispute that the unwed mother may be entitled to equal protection but not the unwed father.

Respondent in *Stanley* makes two arguments defending the "rational purpose" and "countervailing state interest" in the Illinois statutory scheme. First, it facilitates custody proceedings if the court can operate from a presumption and it also facilitates adoption proceedings by ex-

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that, as alleged in the petition in this case, when a *parent* openly and publicly recognizes and accepts an illegitimate to be *his* or *her* child and the child is dependent upon the parent, such an illegitimate is a "child" as expressed. . . ." (emphasis added); see generally Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338 (1969).

26. R. ——— v. R. ———, 431 S.W.2d 152, 154 (Mo. 1968).

27. *Munn v. Munn*, 168 Col. 76, 450 P.2d 68 (1969); but see *Mitchell v. Mitchell*, 445 F.2d 722 (1969). (The court held that legitimate and illegitimate children are equally entitled to support from the father but refused to consider his obligations to his illegitimate children when evaluating his ability to support his legitimate child. The father's primary obligation is to support his original family and this obligation is not affected by a subsequent obligation which he might incur to support other children.)

28. *Storm v. None*, 57 Misc. 2d 342, 291 N.Y.S.2d 515 (1968).

29. *Schmoll v. Creecy*, 54 N.J. 194, 254 A.2d 525 (1969); accord, *In re Estate of Ortiz*, 60 Misc. 2d 756, 303 N.Y.S.2d 806 (1969) (The court held unconstitutional a statute which permitted recovery by an illegitimate for his mother's death but not for his father's).

cluding the putative father from the beginning.<sup>30</sup> However, administrative convenience has always been rejected as a justification for legislation which violates equal protection. The *Stanley* court reaffirms the principle that "the Constitution recognizes higher values than speed and efficiency."<sup>31</sup>

Secondly, the state argues that the classification in the statutes is designed to serve the "best interest" of the children.<sup>32</sup> The statutes, however, fail to achieve this stated purpose because they decide the question of the "best interest" of the child on the criterion of the parent's sex and illegitimacy alone, without considering the needs of the individual child or the entire family situation. They are over-inclusive in their relationship to the purpose of the legislation, to promote the best interest of the child, because they include fathers who would promote this interest and those who would not.

It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children.<sup>33</sup>

Although the statutory scheme of Illinois is unusually explicit in its denial of rights to the putative father, the vast majority of states accomplish the same result through a combination of statutes and practices. *Stanley*, of course, brings all of these practices and statutes into question.

Many states have statutes which define "parent." Alabama,<sup>34</sup> Kansas,<sup>35</sup> North Carolina,<sup>36</sup> and Oregon<sup>37</sup> have specifically included the father of an illegitimate child in their definitions of "parent," while Florida,<sup>38</sup> Georgia,<sup>39</sup> Utah<sup>40</sup> and Wisconsin<sup>41</sup> have specifically excluded the

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30. Respondent's brief at 10.

31. *Stanley* at 656.

32. Respondent's brief at 17.

33. *Stanley* at 654.

34. CODE OF ALA. tit. 34, § 89 (1958). "The word 'parent' or 'parents' as used in this article . . . or other persons who shall have legally acquired the custody of such child or children, and the father of such child or children, though born out of lawful wedlock." *Law v. State*, 238 Ala. 428, 191 So. 803 (1939).

35. KAN. STAT. ANN. § 38—802(h) (1964) ("parent" is defined as guardian and every person who is by law liable to maintain or support a child).

36. N.C. GEN. STAT. § 49—15 (1969) (father of illegitimate a "parent" upon and after the establishment of paternity).

37. ORE. REV. STAT. § 109.060 (1969), makes no distinction between parents who are married and those who are not if paternity is established.

38. FLA. STAT. ANN. § 39.01 (1961).

39. GA. CODE ANN. § 74.203 (1963) (mother only recognized parent unless father legitimates the child).

40. UTAH CODE ANN. 1953, § 77—60—1 (putative father occupies no recognized

father. North Dakota,<sup>42</sup> South Dakota,<sup>43</sup> and Tennessee<sup>44</sup> exclude the father from their definition of "parent," only for the purposes of birth and judicial records; otherwise, the statutes do not differentiate between mother and father as "parent." Texas<sup>45</sup> stands at the extreme end of the spectrum, denying the father of an illegitimate any recognition as a "parent."

The fate of these definitions after *Stanley* will depend upon the purpose for which they are used. It may be permissible, for example, to use only the mother's name for birth and judicial records, since she is more readily identifiable and there is no fundamental right involved. However, the definition is more frequently used to distinguish custody rights and adoption procedures and it is in this connection that *Stanley* becomes more important.

Questions of custody have led to extensive discrimination against the putative father. The mother of an illegitimate child has traditionally had the primary right to custody.<sup>46</sup> This right has, in some situations, been enacted into statutory form;<sup>47</sup> in other instances, it is merely a very strong tradition.<sup>48</sup> It has been considered exclusive<sup>49</sup> and, alternatively, primary only if the child is not legitimated or paternity established.<sup>50</sup> Illi-

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paternal status); *Thomas v. Children's Aid Society of Ogden*, 12 Utah 2d 235, 364 P.2d 1029 (1961).

41. WIS. STAT. ANN. § 48.02 (1971); *Adop. of Morrison*, 260 Wis. 50, 49 N.W.2d 763 (1951); 30 Ops. Atty. Gen. 282 (1941).

42. N.D. CENT. CODE § 32—36—35, § 36—36—02 (1960).

43. S.D. COMPILED LAWS ANN. § 25—8—46, § 25—8—2, § 25—8—44 (1967).

44. TENN. CODE ANN. § 36-236 (1970); *cf.* WYO. STAT. ANN. § 14—53, § 14—60 (1957).

45. *Home of Holy Infancy v. Kaska*, 397 S.W.2d 208 (Tex. 1965) (The father has by virtue of his blood relationship to illegitimate child no rights or duties toward that child).

46. *See generally* CLARK, DOMESTIC RELATIONS (1968).

47. CAL. CIV. CODE § 200 (19 ); CONN. STAT. ANN. 1969 § 45—43; N.D. CENT. CODE § 14—09—05 (1960); N.J.S.A. 9:16—1 (19 ).

48. *See* cases collected 98 A.L.R.2d 417 (1964); *see especially In re Neff*, 189 Pa. Super. 370, 476, 150 A.2d 563, 566 (1959); *In re Richardet*, 280 S.W.2d 466 (Mo. App. 1955); *Norcia v. Richard*, 32 App. Div. 2d 656, 300 N.Y.S.2d 608 (1969), reversed a lower court ruling in favor of the father since the mother of an illegitimate child is prima facie entitled to custody; *McMillan v. McMillan*, 224 Ga. 790, 164 S.E.2d 839 (1968) mother held to be entitled to the custody of her illegitimate child as against her parents after they had cared for the child for ten years.

49. UTAH CODE ANN. 77—60—1 (1953); *Clements v. Banks*, 159 So. 2d 892 (Fla. App. 1964); *Home of the Holy Infancy v. Kaska*, 397 S.W.2d 208 (Tex. App. 1965); *Cleaver v. Johnson*, 212 S.W.2d 197 (Tex. App. 1948).

50. ORE. REV. STAT. § 109.080 (1969); N.C. GEN. STAT. § 49—15 (1969).



nois courts have, of course, decided according to the former view. As recently as 1970, for example, the Illinois Supreme Court in *Vanderlaan v. Vanderlaan*<sup>51</sup> awarded custody of a child to the mother, reversing an order of the trial court which had granted custody to the father of the children as contrary to the policy of the statutes.

Although it may seem logical that the right to custody would be a corollary to an obligation to support,<sup>52</sup> at least twenty states have no statutory provision for custody by the father, while only Texas does not have any support provision. In many states, however, the father has a right to custody as against all third parties, at least when the mother dies.<sup>53</sup> This is particularly true when the putative father has acknowledged the child and is supporting it.<sup>54</sup>

There are occasions when the father may displace the primary rights of the mother:<sup>55</sup> the mother is adjudged unfit, the mother rejects the child, or the court determines that it is in the best interest of the child. For example, the North Carolina Court, while recognizing the primary rights of the mother, acknowledged that the father had such an interest in the welfare of the child that he could bring a proceeding for its custody.

As against the right of the mother of an illegitimate child to its custody, the

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51. 126 Ill. App. 2d 410, 262 N.E.2d 717 (1970); see also *People ex rel. Buell v. Bell*, 20 Ill. App. 2d 82, 155 N.E.2d 104 (1959).

52. See generally *Disposition of the Illegitimate Child—Father's Right to Notice*, 1968 U. ILL. L.F. 232.

53. 37 A.L.R.2d 884.

54. ARIZ. REV. STAT. ANN. § 14—846 (1956), *Caruso v. Superior Ct.*, 100 Ariz. 167, 412 P.2d 463 (1966); CAL. CIVIL CODE § 200, *In re Guardianship of Smith*, 42 Cal. 2d 91, 265 P.2d 888 (1954); LA. CIV. CODE ANN. art. 256, and 202; *In re Shady*, 264 Minn. 222, 118 N.W.2d 449 (1962); *In re Zink*, 269 Minn. 535, 132 N.W.2d 795 (1964); *Aycock v. Hampton*, 84 Miss. 204, 36 So. 245 (1904); MISS. CODE § 373—01, 383—04 (1962); *Dodge County v. Kemnitz*, 49 N.W. 226 (Neb. 1891); *Re Guardianship of C.*, 98 N.J. Super. 474, 237 A.2d 652; N.J. STAT. ANN. tit. 9: 2—19; 9:16—1 (1960); *Fierro v. Ljubcicich*, 165 N.Y.S.2d 290 (1957); N.C. GEN. STAT. § 49—15 (1969); OHIO REV. CODE ANN. § 2105.18 (Baldwin 1964); *French v. Catholic Community League*, 69 Ohio App. 442, 44 N.E.2d 113 (1942); *Commonwealth ex rel. Kevitch v. McCue*, 165 Pa. Super. 49, 67 A.2d 582 (1949); *Human v. Hyman*, 63 A.2d 447 (Pa. 1959); WASH. REV. CODE § 26.24.190 (1967); *State ex rel. Smith v. Superior Ct.*, 23 Wash. 2d 357, 161 P.2d 914 (1951); *Wade v. State*, 39 Wash.2d 744, 238 P.2d 914 (1951); *In re Aronson*, 58 N.W.2d 553 (Wis. 1953).

55. *In re Brennan*, 270 Minn. 455, 134 N.W.2d 126 (1965); *Cornell v. Hardley*, 54 Misc. 2d 732, 283 N.Y.S.2d 318 (1957); *Dellinger v. Bollinger*, 242 N.C. 696, 89 S.E.2d 592 (1955); *Godizez v. Russo*, 49 Misc. 2d 66, 266 N.Y.S.2d 636 (Fam. Ct. 1966); *Sanders v. Sanders*, 232 S.C. 25, 103 S.E.2d 281 (1958); *Hayes v. Strauss*, 151 Va. 136, 144 S.E. 432 (1928); *In re Estate of Moore*, 68 Wash.2d 792, 797, 415 P.2d 653 (1966); UTAH CODE ANN. 1966, § 77—60—12.

putative father may defend only on the ground that the mother, by reason of character or special circumstance, is unfit or unable to have the care of her child and that, for this reason, the welfare, or best interest, of the child overrides her paramount right to custody.<sup>56</sup>

Some courts have begun to treat children born out of wedlock in the same manner as legitimate children and custody is determined not by a view to parental "rights," whether those of the mother or of the father, but to the "best interest" of the child.<sup>57</sup> It has occurred to some courts that it may in fact be in the best interest of the child to have the father's companionship and care.<sup>58</sup>

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56. *Jolly v. Queen*, 264 N.C. 711, 714, 142 S.E.2d 592, 595 (1965).

57. *In re Mark T.*, 8 Mich. App. 122, 146, 154 N.W.2d 27, 39 (1967). The court awarded custody of the illegitimate child to the putative father saying: "We are not aware of any sociological data justifying the assumption that an illegitimate child reared by his natural father is less likely to receive a proper upbringing than one reared by his natural father who was at one time married to his mother, or that the stigma of illegitimacy is so pervasive it requires adoption by strangers. . . ."

58. Note that although the following states specifically exclude the father from a definition of "parent," they do subscribe to the contradictory "best interest" test. In *Arndt v. Prose*, 94 So.2d 818 (Fla. 1957), the natural mother had no absolute legal right to the custody of a 12 year old illegitimate son who at the age of 6 had been placed by the father in the care of his sister and husband; *State ex rel. Doering v. Doering*, 267 Wis. 12, 64 N.W.2d 240 (1954), the mother sought custody of her child who had lived with the grandparents for seven years—custody should be determined by the best interest of the child; *Jensen v. Earley*, 63 Utah 604, 228 P. 217 (1924), the court held that although there is a presumption for the mother, the guiding principle is always the best interest of the child; *Jackson v. Luckie*, 205 Ga. 100, 52 S.E.2d 588 (1949), the judge awarded custody to the grandmother and visitation rights to the mother; *James v. Bowen*, 224 Ga. 289, 161 S.E.2d 277 (1968), the court held that the best interest of the child was in the custody of the father; see also *Commonwealth ex rel. Staunton v. Austin*, 209 Pa. Super. 187, 190, 223 A.2d 892, 894 (1966), where the court said, the paramount consideration is the welfare of the children and all other considerations, including the rights of the parents, are subordinate to the intellectual, physical, moral and spiritual well-being of the child; *Godinez v. Russo*, 49 Misc.2d 66, 266 N.Y.S.2d 636 (1966), where custody of illegitimate children was awarded to the father and the court said that the presumption in the mother's favor should be abolished and no distinction should be made between legitimate and illegitimate children in custody questions; accord, *Anonymous v. Anonymous*, 56 Misc.2d 711, 289 N.Y.S.2d 792 (1968); *State ex rel. Smith v. Superior Ct.*, 23 Wash.2d 357, 161 P.2d 188 (1945). See also ORE. REV. STAT. § 109.030 (1969). "The rights and responsibilities of the parents, in the absence of misconduct, are equal, and the mother is as fully entitled to the custody and control of the children and their earnings as the father. In case of the father's death, the mother shall come into as full and complete control of the children and their estate as the father does in case of the mother's death." N.Y. DOMES REL. LAW § 70—no prima facie right to custody of child in either parent; TENN. CODE ANN. 36—229 (1970) provides: "upon request by the defendant father, the court may also in its discretion, if deemed in the best interest of the child, award custody of the child to the defendant provided that such defendant has not denied paternity of said child. . ."; CAL. CIV. CODE

Illinois has long been a part of the majority of jurisdictions which consider the present and prospective welfare of the legitimate child in custody disputes.<sup>59</sup> There is still, however, a presumption in Illinois that the best interest of a young child is with the mother, all other considerations being equal.<sup>60</sup> There are, on the other hand, a number of Illinois cases which have awarded custody to the father over the mother of the legitimate child, if the court has determined that it is in his best interest.<sup>61</sup> In any case, Illinois and most other states which adhere to the best interest rule still require proof of unfitness of the parent prior to denying custody.<sup>62</sup> The parent, if he or she can be found, must be served with summons and have the opportunity to deny unfitness. As we have seen, *Stanley* requires that the same treatment be afforded to the father of an illegitimate child.

*Stanley* may have additional implications for custody procedures. It is clear that at the very least, neither the exclusive primary right nor the presumptive primary right of the mother can withstand equal protection analysis. The exclusive primary right of the mother is manifestly a classification which denies the father his fundamental right to his children without a powerful countervailing interest." Similarly, the presumptive primary right of the mother is "repugnant" to the equal protection clause. Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.<sup>63</sup>

Both the unmarried mother and the unmarried father are "constitutionally entitled to a hearing on their fitness before their children are removed from their custody."<sup>64</sup> This undoubtedly means that there can be no "primary" or "secondary" rights to the custody of children, but that the mother and father would be viewed as having equal rights. If there were a conflict in the exercise of these "equal rights," both parents would be entitled to a hearing. The test of the "best interest of the child" would presumably determine whose rights would prevail.

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§ 230—equal rights of natural parents if child is legitimated; MD. ANN. CODE art. 16, § 66 (1947)—custody determined by court in best interest of the child.

59. *People ex rel. Noonan v. Wingate*, 376 Ill. 244, 33 N.E.2d 467 (1941).

60. *Nye v. Nye*, 411 Ill. 408, 105 N.E.2d 300 (1952); *Giaropelli v. Florence Crittenton Home*, 16 Ill. 2d 556, 158 N.E.2d 613 (1959).

61. *Kline v. Kline*, 57 Ill. App. 2d 244, 205 N.E.2d 775 (1965).

62. ILL. REV. STAT. ch. 4, § 9.1—5 (1964).

63. *Stanley* at 656-57.

64. *Id.* at 658.

The implications of *Stanley* for the putative father's visitation rights will probably not be as great as in the area of custody. Some states have already begun to award visitation privileges to the putative father even though custody has been awarded to the mother and even though she objects to these visits.<sup>65</sup> An early statement of this position came out of a New Jersey court:

I think it is much better for the child to have the father visit it at stated times, not only to learn of its continued welfare, but to infuse into it at an early age the natural love and affection that it should have for a parent who is interested in its well being.<sup>66</sup>

Florida,<sup>67</sup> Alabama,<sup>68</sup> California,<sup>69</sup> New York,<sup>70</sup> Oklahoma<sup>71</sup> and most recently Pennsylvania<sup>72</sup> have allowed visitation as a matter of right. Among these states it is generally held that the father's privileges of visitation are dependent upon his contributions to the support of his illegitimate child.<sup>73</sup>

The most significant of these cases is the recent Pennsylvania case of *Commonwealth v. Rozanski*,<sup>74</sup> which expressly overruled a tradition<sup>75</sup> conclusively presuming it to be detrimental to the child to grant visitation privileges to the putative father. This court held that although the mother was against visitation by the father and was going to marry another man, it was in the best interest of the child to see its father. A year later Illinois ruled on the identical issue in *De Phillips v. De-Phillips*.<sup>76</sup> The Illinois Supreme Court overruled the circuit court's order granting the father visitation rights, maintaining that the Bastardy Act not only prohibits the granting of custody but also the granting of "con-

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65. See generally Comment, *A Father's Right to Visit his Illegitimate Child*, 27 OHIO S.L.J. 738 (1966).

66. *Baker v. Baker*, 81 N.J. Eq. 135, 138, 85 A. 816, 817 (1913).

67. *Mixon v. Mize*, 198 So.2d 373 (Fla. Ct. App. 1967).

68. *Bagwell v. Powell*, 267 Ala. 19, 99 So.2d 195 (1957).

69. *Strong v. Owens*, 91 Cal. App. 2d 336, 205 P.2d 48 (1949).

70. *People ex rel. Francois v. Ivanova*, 14 App.Div.2d 317, 221 N.Y.S.2d 75 (1961).

71. *Ex parte Hendrix*, 186 Okla. 712, 100 P.2d 444 (1940).

72. *Commonwealth v. Rozanski*, 206 Pa. Super. 397, 213 A.2d 155 (1965).

73. *Anonymous v. Anonymous*, 56 Misc.2d 711, 289 N.Y.S.2d 792 (1968): acknowledgment and support do not have to be voluntary for the court to consider granting visitation privileges.

74. 206 Pa. Super. 397, 213 A.2d 155 (1965).

75. *Commonwealth ex rel. Golembewski v. Stanley*, 205 Pa. Super. 101, 208 A.2d 49 (1965).

76. 35 Ill. 2d 154, 219 N.E.2d 465 (1966). But see the dissent holding that you cannot equate visitation with custody or control, which the statute prohibits.

trol" to a putative father. The year before in *Wallace v. Wallace*,<sup>77</sup> the appellate court had more comprehensively stated that the illegitimate child had no right to the "society" of his father and that the father of that child may not bring an action in the name of that child in a suit asking for companionship and support.<sup>78</sup>

Considering the import of *Stanley*, those states that have not allowed visitation by the father will probably have to consider on a case-by-case basis, what is the best interest of the child. Certainly the blanket statements of *Wallace v. Wallace* will no longer be tolerated.

The putative father is also denied the right to consent to the adoption of his child by the majority of jurisdictions.<sup>79</sup> A few courts before *Stanley* had raised the question whether the denial to the father of notice of adoption proceedings is a denial of equal protection or due process. In *Thomas v. Children's Aid Society of Ogden*,<sup>80</sup> the court held that if the putative father has any rights, they are not covered by any constitutional provisions. However, North Dakota<sup>81</sup> by statute, and Ohio<sup>82</sup> by judicial decree, have guaranteed the right of notice of adoption proceedings to

77. *Wallace v. Wallace*, 60 Ill. App. 2d 300, 210 N.E.2d 4 (1965).

78. This ended any dispute about the meaning of *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), allowing visitation rights.

79. CONN. STAT. ANN. § 45—61 (1969); DEL. CODE ANN. tit. 13, § 908 (1965); FLA. STAT. § 972.14 (1965); GA. CODE ANN. 113—904 (1964); IDAHO CODE § 16—1504 (1965); ILL. REV. STAT. ch. 4, § 9.1—8 (1969); KAN. STAT. ANN. § 59—2102 (1964); KY. REV. STAT. § 199.500 (1964); LA. REV. STAT. ANN. § 9.404 (1965); ME. REV. STAT. ANN. tit. 19, § 532 (1967); MASS. GEN. LAWS ANN. ch. 210 § 2 (1970); MICH. CIV. LAW ANN. § 710.3 (1968); MINN. STAT. ANN. § 259.24 (1971), but *In re Brennan*, 270 Minn. 455, 134 N.W.2d 126 (1965)—putative father who appears at adoption proceeding is entitled to be heard; MISS. CODE § 1269—03 (1962); VERNONS MO. STAT. ANN. § 453.030 (1965); MONT. REV. CODE § 61—205 (1970); NEB. REV. STAT. § 43—104 (1968); NEV. REV. STAT. § 127 040 (1967); N.H. REV. STAT. ANN. ch. 641.3 (1968); N.J. STAT. ANN. tit. 9:3—19; 9:3—18 (1960); N.M. REV. STAT. ch. 22—2—5 (1967); N.Y. DOM. REL. LAW § 111 (McKinney 1964); N.C. GEN. STAT. § 48—6 (1969); PAGES OHIO REV. CODE § 1307.06 (1969); OKLA. STAT. ANN. tit. 10, § 606 (1961); PURDON'S PA. STAT. ANN. tit. 1, § 2 (1963); R.I. GEN. LAW § 15—7—5 (1956); S.C. CODE § 10—2587.7 (1964); S.D. COM. LAWS § 25—6—4 (1967); TENN. CODE § 36—111 (1956); VERNON'S ANN. TEX. STAT. art. 46, § 6 (1955); VT. STAT. ANN. tit. 15, § 435 (1967); VA. CODE § 63.1-225 (1968); WASH. REV. CODE ANN. § 26.32.030 (1967); W. VA. CODE § 48—4—1 (1969); WIS. STAT. ANN. § 48.84 (1957), but *In re Aronson*, 58 N.W.2d 553 (1953), if the father voluntarily appears at the proceedings, he will be heard; WYO. STAT. § 1—710.1 (1963). As this article goes to print, Illinois has applied *Stanley* to this area: *Slawek v. Covenant Children's Home*, 52 Ill. 2d 20 (1972).

80. 12 Utah 2d 235, 364 P.2d 1029 (1961); *accord*, *In re Blake's Adoption*, 21 Wash. 2d 547, 151 P.2d 825 (1944).

81. N.D. CODE tit. 14—11—10 (1961) (repealed 1971).

82. *Balint v. Horvath*, 34 Ohio St. 2d 247, 212 N.E.2d 220 (1965).

the father who acknowledges his paternity or against whom paternity is adjudged. Some courts, however, have refused to allow the father the right to adopt even when he has been notified of the proceedings.<sup>83</sup>

There are four typical exceptions in some jurisdictions to the above stated rule of consent to adoption. First, if the mother dies after giving her consent, the natural father has the right to revoke consent before the final decree.<sup>84</sup> Secondly, the father's consent may be required if he supports the child.<sup>85</sup> Thirdly, the father's consent may be necessary if the child is acknowledged or legitimated.<sup>86</sup> Fourthly, the father's consent may be necessary if paternity is established.<sup>87</sup>

Adoption is a more difficult area to apply *Stanley* because a better argument can be made for a "countervailing state interest." A sharp eye for the best interest of the child must be maintained and insurmountable notice and consent requirements cannot be established. At the very least, a father's consent should be necessary if he is supporting or actively acknowledging his child. However, he should not be allowed to refuse consent and then not assume the burdens of custody.

Finally, it is interesting to note that so recently after the widely heralded United States Supreme Court decision of *Reed v. Reed*,<sup>88</sup> the Court in *Stanley* did not consider it necessary to mention that the statutory classification which affected *Stanley* was sex-based and for that reason may be open to constitutional attack.<sup>89</sup> The fact that *Reed v. Reed* only merited a footnote in connection with "administrative convenience" may indicate the importance with which the Court regards the holding, although it is the only Supreme Court decision which has held that a sex-based classification is a violation of the fourteenth amendment.<sup>90</sup>

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83. *Petition of Malmstedt*, 220 A.2d 147 (Md. Ct. App. 1966), the court refused the father's adoption of his illegitimate child even though the mother did not want her; *accord, In re Adoption of A*, 226 A.2d 823 (Del. 1967); *In re Adoption of Irby*, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964).

84. *In re Schwartzkopf*, 149 Neb. 460, 31 N.W.2d 294 (1948).

85. IOWA CODE ANN. § 600.3 (1969); UTAH CODE ANN. § 78—30—4 (1966).

86. ALAS. STAT. tit. 120, § 20.10.040 (1967); ARIZ. REV. STAT. § 8—103 (1956); CAL. CIV. CODE § 224 (Deering 1961); COLO. REV. STAT. art. 4—1—6 (1963); HAWAII REV. STAT. § 578—2 (1969); MD. ANN. CODE art. 16, § 74 (1957).

87. ALA. CODE tit. 27, § 3 (1958); *Ariz. Rev. Stat.* § 8—103 (1956); ARK. STAT. ANN. § 56—106 (1947); BURNS ANN. IND. STAT. § 3—120 (1968)—only the mother's consent is necessary unless the father contributes to the support and his paternity is established; then, the father's consent is necessary if his address is known or can be found without an expenditure exceeding \$5.00; ORE. REV. STAT. § 109.080 (1971).

88. *Reed v. Reed*, 404 U.S. 71 (1971).

89. Petitioner only mentioned *Stanley's* sex once at p.18 of his brief.

90. "To give a mandatory preference to members of either sex over members of

Even more ominous than the location of the citation is the fact that Chief Justice Burger authored the majority opinion in *Reed v. Reed* and the dissent in *Stanley*. It is difficult to comprehend how he could strike down the classification which gave mandatory preference to the appointment of male administrators, and a few months later justify the Illinois statutes which gave mandatory preference to women. Perhaps this inconsistency can be accounted for by the fact that the only justification for the Idaho legislation was "administrative convenience," whereas here, Burger could call upon "centuries of human experience."<sup>91</sup> He also takes judicial notice of the "fact" that:

most unwed mothers exhibit a concern for their offspring either permanently or at least until they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties.<sup>92</sup>

More importantly:

Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers. While these, like most generalizations, are *not without exceptions*, they nevertheless provide a *sufficient basis to sustain a statutory classification* whose objective is not to penalize unwed parents but further the welfare of illegitimate children in fulfillment of the State's obligations as *parens patriae*.<sup>93</sup>

It is disappointing that *Reed v. Reed* did not play a stronger role in *Stanley*, but it is really not surprising considering the persistent reluctance and consistent refusals of the Court to invalidate sex-based classifications under the fourteenth amendment.<sup>94</sup> It is doubtful, therefore, that *Stanley* could be used to invalidate a sex-based classification unless a fundamental right is involved.<sup>95</sup>

The Supreme Court cannot consider, of course, the implications of an unratified amendment, but it can be noted parenthetically that the recent

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the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex." *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

91. *Stanley* at 666. Even more disgraceful is Burger's attempt to severely limit *Levy* by agreeing with Illinois' argument that the state only recognizes those father-child relationships that are legalized by marriage or adoption.

92. *Id.* at 665.

93. *Id.* at 666.

94. *Hoyt v. Florida*, 368 U.S. 57 (1961); *Gruenwald v. Gardner*, 390 F.2d 591 (2d Cir.), cert. denied, 393 U.S. 982 (1968); *United States v. St. Clair*, 291 F. Supp. 122 (S.D.N.Y. 1968).

95. *Cf. Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971).

approval of the equal rights amendment<sup>96</sup> by the Senate will probably make statutes and practices which discriminate against the father of illegitimate children unconstitutional. The basic principle of this amendment is that it is no longer permissible to use sex as a factor in determining the legal rights of men and women.<sup>97</sup> The law may impose different benefits and different burdens upon individual members of society, but this differentiation must be based on particular characteristics and may not be sex-based. The particular legislation in *Stanley*, therefore, could not be sustained on the theory that Chief Justice Burger espoused in his dissent; namely, that in our society women are more likely to fulfill the child-centered role or that unwed fathers in the past have not wished to be burdened with their offspring. Certainly a functional classification could be devised which could achieve the same social objectives without discriminating against individuals on account of their sex.

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96. H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971).

97. Barbara A. Brown, Thomas I. Emerson, Gail Falk and Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 872, 889 (1971); see also *Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 215 (1971).